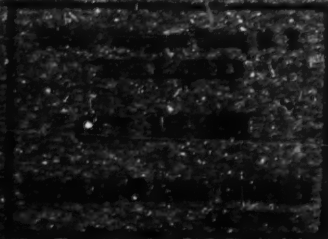


FILE COPY



UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

THE UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA

CERTIFICATE OF NATURALIZATION AND CITIZENSHIP
PART: CITIZENSHIP UNDER THE LAW OF THE UNITED STATES
TAKEN AT THE COURT OF NATURALIZATION, DISTRICT OF COLUMBIA, D. C.

ON THIS DAY OF CERTIFICATION TO THE OFFICE OF THE DISTRICT CLERK
OF THE DISTRICT OF COLUMBIA FOR THE RECORDS

WITNESSETH MY HAND AND SEAL OF OFFICE



In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY,
TRUSTEE UNDER THE LAST WILL AND TESTAMENT
OF JAMES DUGGAN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In the brief for the United States it has been argued that the suit was timely filed within the six-year collection period provided by the statute after a timely assessment. A timely assessment was made against James Duggan and the suit was instituted within the six-year period following that assessment. Respondents contend that the six-year collection period after a timely assessment is not available here (1) because the assessment was made after James Duggan's death and was therefore invalid, and (2) because even if the six-year period

would have been applicable to James Duggan it is not applicable to respondent.

These objections of the respondents were dealt with in the brief already filed. However, it is desirable also to suggest that the suit was timely because filed within the period allowed for assessment. Section 277 (a) (3) of the Revenue Act of 1926 provides a period for assessment but permits a suit to be begun within that period without actually making the assessment. This is made applicable to transferees by Section 280 (a). Accordingly, if this suit was instituted within the statutory period for assessment it should be unnecessary to consider whether it was timely within the collection period.

The corporate return was filed May 16, 1921, and thus the five-year assessment period applicable to the corporation did not expire until May 16, 1926. It is conceded that Section 280 (b) of the Revenue Act of 1926 provides an extra year for assessment against either an initial transferee or a subsequent transferee (Br. 11). Accordingly, the period for a valid assessment against transferees would not expire before May 16, 1927. While that period had still thirteen months and one day to run a deficiency letter was sent to James Duggan and he appealed to the Board of Tax Appeals.

It appears to be conceded that the Board proceedings suspended the assessment period at least as to James Duggan, so that the controversy is narrowed to whether the suspension was also ap-

plicable to respondents. In the brief already filed the Government has contended that, since a timely assessment was made against James Duggan and this is a suit to collect his liability, the entire period of suspension applicable to James Duggan is also applicable to respondents. But it will be sufficient for the purposes of this case to hold that only part of that period is applicable.

Respondent Bank was a testamentary trustee of James Duggan, and Henry Duggan was a legatee. Part of the suspension period had run before the transfers were made to the testamentary trustee and legatee. We think it is obvious that the period of suspension which elapsed while James Duggan was alive and was the sole transferee must necessarily affect the assessment period applicable to respondents. During the time that James Duggan was the sole transferee the Government had no opportunity to proceed against respondents, so that it cannot be contended that that portion of the suspension period is inapplicable because of a possible independent right to proceed against respondents.¹ Respondents' liability is derived from James Duggan and the transfer of the estate to respondents could not have the effect of eradicating what had then transpired. The transfer of the estate to respondents was made some time subsequent to April 24, 1931 (R. 5) and since the assessment period had not then expired as to James Duggan, it seems clear

¹ Section 274 (a) would have prevented any action against James Duggan's personal representatives.

that it had not expired as to anyone subsequently succeeding to his liability. It cannot be true that a separate period for assessment against respondents had been running prior to the time of the transfer of the assets. Such a construction is wholly inadmissible. This Court considered a similar situation at the last Term in *United States v. Wurts*, 303 U. S. 414. It was there said (p. 418):

It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued.

Accordingly, if we concede for the purpose of the argument that the suspension period did not endure until September 25, 1931 (60 days after the Board's decision became final), and if we compute a separate assessment period for respondents, it will be seen that this separate period had not expired on May 6, 1932, when the suit was instituted. The suspension period began on April 15, 1926, when the deficiency letter was sent to James Duggan. Thirteen months and one day were then left of the transferee assessment period. If it is held that the suspension period ended as to respondents on April 24, 1931, and that the only time remaining for assessment against respondents was the sixty days given by Section 280 (d) and the thirteen months and one day which had not run when the suspension period began, it is clear that

upon that basis the assessment period did not expire until July 24, 1932. Therefore, under Section 277 (a) (3) of the Revenue Act of 1926 a suit could have been brought without any assessment as late as July 24, 1932. Thus this suit instituted on May 6, 1932, was timely.

We wish to emphasize that under a proper construction of the statute the suspension period cannot be taken to terminate upon the transfer of the assets held by the transferee. Any such rule would make it necessary that the Commissioner keep an impossibly close watch over the person against whom he proposes to assess the liability. But it seems worth while to point out to this Court that, even if this rule were accepted, the present action was timely. On that basis there is no necessary occasion for the Court to consider whether the assessment against James Duggan was valid or whether the six-year collection period is applicable.²

Relying upon *United States v. Updike*, 281 U. S. 489, and *Commissioner v. Krug*, 78 F. (2d) 57 (C. C. A. 9th), respondents' contention in substance is that the period for collecting any liability from them is six years from the assessment against the original taxpayer. The transferees involved in the *Updike* and *Krug* cases received distribu-

² For the convenience of the Court there is attached as an Appendix a chronological tabulation of the important dates involved in this case.

tions directly from the original taxpayers and the time for proceeding against them as transferees was held to be dependent upon the time allowed for proceedings against the original taxpayers. Since the respondents' liability is derived directly from James Duggan, the reasoning of the cited cases appears to us to require that the time for assessing or collecting from transferees of James Duggan should be dependent upon the time allowed for proceeding against James Duggan, rather than upon the time allowed for proceeding against the original taxpayer.

Since the assessment against the original taxpayer was made in January 1925, respondents are driven to the position that the six-year collection-period had already expired when their liability first arose by the transfer of the estate subsequent to April 24, 1931. On the authority of *United States v. Wurts, supra*, we submit that there is no room for such construction.

Respectfully submitted.

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WARNER W. GARDNER,
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OCTOBER 1938.

APPENDIX

May 16, 1921. Income tax return filed by Johnston City & Big Muddy Coal & Mining Company (R. 3).

December 29, 1921. Taxpayer corporation dissolved (R. 14).

December 16, 1924. Deficiency notice for \$316,620.61 mailed to corporation (R. 3).

January 1925. Additional tax of \$316,620.61 assessed against taxpayer corporation (R. 3).

April 15, 1926. Notice of transferee liability in the sum of \$295,331.64 mailed to James Duggan pursuant to Section 280, Revenue Act of 1926 (R. 14).

May 16, 1926. Five-year period for assessment against taxpayer corporation expired. Section 277 (a) (3), Revenue Act of 1926.

June 11, 1926. Appeal to Board of Tax Appeals filed by James Duggan (R. 14).

May 16, 1927. Period for assessment against James Duggan would have expired except for notice of April 15, 1926. Section 280 (b) (1), Revenue Act of 1926.

March 1929. James Duggan died (R. 5).

January 6, 1930. Findings of Fact and Opinion promulgated by Board of Tax Appeals. 18 B. T. A. 608.

January 27, 1931. Decision entered by Board of Tax Appeals fixing liability of James Duggan in the sum of \$295,331.64 (R. 11, 14-15).

February 14, 1931. Jeopardy assessment made against James Duggan for above liability and interest (R. 15).

April 24, 1931. Proof of claim filed with administrator of estate of James Duggan, deceased (R. 5).

July 27, 1931. Decision of Board of Tax Appeals became final. Section 1005, Revenue Act of 1926.

September 25, 1931. Termination of period of suspension for assessment against James Duggan. Section 280 (d), Revenue Act of 1926, as amended.

May 6, 1932. This action brought for collection of amount assessed against James Duggan (R. 1).

October 26, 1932. Expiration of period for assessment against James Duggan, as extended (thirteen months and one day after September 25, 1931).

February 14, 1937. Expiration of six-year period for collection of assessment made against James Duggan on February 14, 1931. Section 278 (d), Revenue Act of 1926.

